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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MELVIN STONE, Defendant and Appellant.	B206859 (Los Angeles County Super. Ct. No. MA038998)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey, and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

On January 17, 2008, a jury found appellant Melvin Stone (Stone) guilty of one count of battery with infliction of serious bodily injury (Pen. Code, § 243, subd. (d)),[1] one count of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), and the lesser offense of misdemeanor child endangerment (§ 273a, subd. (b)). With respect to the assault count, the jury found the allegation that Stone personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)) to be true. As to the allegation on all counts that Stone had one prior strike conviction (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), Stone admitted the allegation was true.

The trial court sentenced Stone on the assault conviction to the middle term of three years, doubled pursuant to the "Three Strikes" law, plus three years for the great bodily injury enhancement, plus five years for the prior serious felony enhancement, for a total of 14 years in state prison. The sentence on the battery conviction was stayed pursuant to section 654. The sentence on the child endangerment conviction was ordered to run concurrently with the sentence for assault.

Stone contends the trial court abused its discretion in admitting evidence that Stone's ex-wife met her partner in a domestic violence shelter and that trial counsel was ineffective for failing to object properly. Stone also contends the evidence was insufficient to support the misdemeanor child endangerment conviction. Stone further contends the trial court abused its discretion in denying Stone's motion to dismiss his prior strike. While we find error in the trial court's admission of testimony that Alison Stone (Alison) and Casondra Jonson (Jonson) met at a domestic violence shelter, we conclude that this error was harmless. Thus, we reject Stone's contentions and affirm the judgment.

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

BACKGROUND

On June 21, 2007, Jonson had been living together with her partner, Alison,[2] in Lancaster, California for about a year. Jonson's three children, X., S., and W. lived with them, as did Alison's and Stone's son, L.

Alison and Stone were going through a divorce at about that time. There had been several custody hearings. At some point after June 13, 2007, the court awarded Alison primary physical custody of L. Both Stone and Alison learned of the custody award on June 21, 2007.

At about 4:00 p.m. on June 21, Alison received a call from Stone. In one of several subsequent telephone calls, Stone said to Alison, "You are two dead bitches." She heard L. in the background say "leave me alone," and "no, I don't want to go. Leave me here." Her son's statements concerned Alison. She went to the Sheriff's station to file a report. She also asked that someone go by Stone's house to check on L. She received a call back from the Sheriff's station telling her "everything was okay."

Jonson was sitting on her bed talking to her mother by phone, while Alison played cards at the kitchen table with Jonson's three children. Jonson left the house to retrieve her cell phone and cigarettes from the glove compartment of Alison's car, which was parked on the driveway. She sat in the driver's seat for a moment and rolled down the window as she looked for another item. Suddenly, she "just felt something," and she grabbed her mouth. She was bleeding "everywhere." As she turned to look in the direction of whatever had hit her, she saw Stone walking away, towards his truck. Stone did not say anything.

Jonson got out of the car and made her way to the front door of the house. She heard the dog barking, then the door opened, and both the dog and Alison ran out. Jonson fell into Alison's arms and said, "He hit me. He hit me." Alison began tending to

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[2] As appellant and Ms. Stone share the same last name, for purposes of clarity, we refer to her by her first name. No disrespect is intended.

Jonson, while Jonson's three children ran out to catch the dog. Alison saw Stone run from the dog, toward his truck.

Stone got into his truck, which was parked on the street. Both Alison and Jonson saw L. in the truck cab, seated between Stone and a woman (possibly named Nina) seated on the passenger side. Alison began screaming to get L. out of the car.

Jonson testified that Stone drove his truck toward the kids three times, in an apparent effort to hit them as they chased the dog. Stone first pulled into the driveway and drove towards the kids. As they moved away, he pulled back and tried again, and then a third time. Jonson said he did not hit any of them, but did hit her dog. She could see Stone's face, which she described as "like a madman." Specifically, his hair wasn't done, "[a]nd he looked rough and very angry. . . ." He appeared to be "[b]iting his teeth."

Jonson also testified that Stone appeared to be trying to hit Alison with the truck and that he did not seem merely to be trying to back up in order to leave. The woman in the passenger's side seat appeared to be covering L.'s eyes.

The paramedics arrived, treated Jonson, and took her to the hospital, were she received six stitches in her lip. She also had a mild concussion.

Deputy Sheriff Kimberly Shelton testified that she interviewed Stone the following day, June 22, 2007. Stone told Shelton he had received "some legal paperwork" regarding his loss of custody of his son, L.; and on June 21, Stone drove to Alison's house to discuss the matter with her. He walked up the driveway to the parked car, thinking the person inside might be Alison. He put his head in the open car window on the driver's side and saw that it was Jonson, not Alison. He told Shelton that Jonson "drew back her right arm, he was concerned that she would strike him, so he hit her" with his left fist. Deputy Shelton looked at Stone's hand and saw swelling in his left ring and middle fingers and a laceration on the inside portion of his middle finger. Shelton asked Stone how hard he had hit Jonson; Stone said he didn't know. Shelton "then told him that he hit her hard enough that her tooth actually went through her lip." Stone responded, "'Oh, no. I didn't mean to hurt her like that, and I'll tell her that I'm sorry.'"

He denied trying to run over the children. He said that if the children did not move away, though, he would have hit them.

The above facts were established at trial. Stone did not testify.

As stated, the jury convicted Stone of battery against Jonson with serious bodily injury, misdemeanor child endangerment, assault against Jonson by means likely to produce great bodily injury. The jury found the great bodily injury allegation to be true. Stone admitted the prior conviction allegation was true.

Before sentencing, Stone moved to dismiss the prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court denied the motion and sentenced Stone to 14 years in state prison. The sentence on the battery conviction was stayed pursuant to section 654. The sentence on the child endangerment conviction was ordered to run concurrently with the sentence on the assault conviction.

This timely appeal followed.

DISCUSSION

A. The Trial Court's Admission of Testimony That Alison and Jonson Met at a Domestic Violence Shelter Was Harmless Error

Stone contends the trial court abused its discretion in admitting Jonson's testimony over Stone's objection that she met Alison at a domestic violence shelter. Stone argues the testimony was irrelevant because there was no dispute that Alison and Jonson were partners and no issue as to why Stone and Alison got divorced. Where the two met "had no bearing on whether appellant assaulted anyone or endangered [L.]." The place where Alison and Stone met did not "logically, naturally and by reasonable inference establish appellant's identity, motive or intent." Even if the evidence had tangential probative value, the evidence "could only have led to the highly inflammatory inference that Alison was in a domestic violence shelter because of appellant[,]" and the jury was "likely to assume that appellant was a violent person and must have assaulted Jonson." Stone claims his conviction was not "clear cut," and it was reasonably likely that admission of evidence inferring he was a violent person negatively influenced the jury.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Evidence is not prejudicial for purposes of section 352 simply because it is damaging to the defendant. (*People v. Smith* (2005) 35 Cal.4th 334, 357.) We review a trial court's ruling under Evidence Code section 352 for abuse of discretion. (*People v. Tafoya* (2007) 42 Cal.4th 147, 174.) "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Any error in admitting evidence is reviewed under the *Watson*[3] harmless error standard. (*People v. Carter* (2005) 36 Cal.4th 1114, 1170–1171.) The "prejudice" referred to in Evidence Code section 352 is described as evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. (*Carter, supra*, 36 Cal.4th at p. 1168.)

Jonson's statement that she met Alison at a domestic violence shelter was not relevant to any witness's credibility, nor did it have "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." ((Evid. Code, § 210.) Similarly, Alison's answer under cross-examination that she and L. were staying at the shelter because of Stone's death threats was similarly irrelevant. In

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[3] *People v. Watson* (1956) 46 Cal.2d 818, 836.

addition, the inference that Stone had previously abused Alison would tend to evoke a negative emotional bias against him. The trial court erred in admitting this evidence.

The trial court's error, however, was harmless. The evidence against Stone was overwhelming, beginning with his admission in his statement to the police that he punched Jonson. Jonson also so testified. Alison testified that Jonson told her Stone had hit her. Alison told the "911" operator the same. If the trial court had not admitted the testimony regarding Jonson and Alison meeting at the domestic violence shelter, it is not reasonably probable that the jury would have reached a more favorable result. (Evid. Code, § 353; *People v. Watson, supra*, 46 Cal.2d at p. 836.) We conclude that the error was harmless and reject Stone's contention.

B. Trial Counsel Was Not Ineffective for Failing to Object to the Domestic Violence Shelter Testimony

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient under an objective standard of professional reasonableness and that there is a reasonable probability that, but for counsel's failings, defendant would have achieved a more favorable outcome. (*In re Thomas* (2006) 37 Cal.4th 1249, 1256; *Williams v. Taylor* (2000) 529 U.S. 362, 390–391 [120 S.Ct. 1495]; *Strickland v. Washington* (1984) 466 U.S. 668, 687, 688, 694 [104 S.Ct. 2064].) We defer to trial counsel's reasonable tactical decisions when examining a claim of ineffective assistance of counsel. (*Bell v. Cone* (2002) 535 U.S. 685, 698 [122 S.Ct. 1843]; *People v. Lucas* (1995) 12 Cal.4th 415, 436–437; *People v. Mayfield* (1993) 5 Cal.4th 142, 176–177; *Strickland v. Washington, supra*, 466 U.S. at p. 689 [104 S.Ct. 1064].) "'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,'" then the reviewing court may do so without first determining whether counsel's performance was deficient. (*Smith v. Robbins* (2000) 528 U.S. 259, 286, fn. 14 [120 S.Ct. 746]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1008, disapproved of on another ground, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, defense counsel timely objected on relevance grounds when the prosecutor first asked where Jonson and Alison met. The court overruled the objection. Counsel's

failure to object again on section 352 grounds would have been a pointless exercise. (*People v. Anderson* (2001) 25 Cal.4th 543, 587 ["Counsel is not required to proffer futile objections."].) Indeed, in not objecting, counsel could have made the reasonable tactical decision not to draw the jury's attention to this harmful evidence. We conclude counsel was not ineffective.

C. Sufficient Evidence Supports Stone's Conviction for Child Endangerment

Stone contends his conviction for misdemeanor child endangerment under section 273a, subdivision (b), must be reversed because there was insufficient evidence that he willfully inflicted unjustifiable physical pain or mental suffering on L. He argues that his conduct was not directed at L. and that L. was not injured, threatened, or even near enough to be in physical danger during Stone's encounter with Jonson. Furthermore, there was insufficient evidence to show that L. suffered mentally.

The standard of review on a challenge to the sufficiency of the evidence to support a conviction is well settled. We "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053–1054.) "Conflicts and even testimony that is subject to justifiable suspicion do not justify the reversal of a judgment. [Citation.]" (*People v. Meals* (1975) 48 Cal.App.3d 215, 222; see also *People v. Green* (1985) 166 Cal.App.3d 514, 517.) "The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296; *People v. Duncan* (2008) 160 Cal.App.4th 1014, 1018.)

Child abuse is committed by any person who "willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured . . . ." (§ 273a, subd. (a) & (b).) It is a felony when committed under circumstances or conditions likely to produce great bodily harm or death (§ 273a, subd. (a)), and a misdemeanor when committed under circumstances or conditions *other*

than those likely to produce great bodily harm or death (§ 273a, subd. (b)). "Section 273a encompasses a wide variety of situations and includes both direct and indirect conduct. [Citations.]" (*People v. Burton* (2006) 143 Cal.App.4th 447, 454.) When the harm to a child is directly inflicted, the requisite mental state for the section 273a offense is general criminal intent. (*People v. Valdez* (2002) 27 Cal.4th 778, 786.) When that harm is indirectly inflicted, the requisite mental state is criminal negligence. (*People v. Valdez, supra*, 27 Cal.4th at p. 781.)

Here, the trial court instructed the jury that to prove Stone was guilty of misdemeanor child abuse, the People had to prove that: "'One, the defendant willfully inflicted unjustifiable physical pain or mental suffering on a child. [¶] Someone commits an act willfully when he does it willingly or on purpose. [¶] A child is any person under the age of 18 years. [¶] Unjustifiable physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.'" The People did not have to prove criminal negligence, only general criminal intent.

The evidence consisted of the following: Alison heard L. during one of her telephone calls with Stone saying "leave me alone" and "no, I don't want to go. Leave me here." Seven-year-old L. testified that he rode in his father's truck, seated in the center, wearing his seatbelt. His father drove, and a woman sat on L.'s other side. L. saw his father get out of the truck and approach the Toyota. He saw Stone lean in the open window of the car. He did not see Stone do anything with his hands. He could see that Jonson was bleeding on her shirt but could not see her face. L. testified that he saw his father run to the truck because the dog was chasing him. Then Stone "looked back and tried to hit my step brothers." He also saw his mother in the street, "[t]hen she jumped backwards into the—the grass. It was almost a direct hit." L. saw his father drive the truck toward his mother and saw her jump out of the way. His father's female friend, who was seated next to L. on the passenger side of the truck, had put her hands in his face to keep him from seeing, but he was able to see "[a] little bit." L. said he was scared while in the truck because he thought his brothers, mother, and Jonson would get killed.

On cross-examination, L. testified that while in the truck, the middle of his eye was level with the dashboard, and he could see out the windshield above that point. At Alison's and Jonson's house, Stone left the truck running when he got out. L. testified that the door of the Toyota was closed, and he could not see whether someone was inside the car. It was after Stone hit Jonson that everybody came out, "then the dog start chasing [Stone] away. And then he ran to his car." As his father backed up the truck, L.'s head was "bumping backwards . . . ." His head "went back and forth three times." His father's friend took her hand off L.'s eyes when the truck reached the street. L. then saw: "My mom was into the street. He went by her and tried to run her over. And then—but she jumped back."

Stone acted deliberately, not just in driving to Alison's house, punching Jonson, and driving his truck back and forth toward the Jonson children and Alison, but in bringing his six-year-old son—the subject of the custody battle—to the Stone-Jonson home in the first place. L. may not have seen his father's fist contact Jonson's lip, but he saw Stone's arm enter the car quickly and Jonson bleeding immediately thereafter. L. experienced Stone driving in what appeared to L. to be an effort to kill L.'s mother and three stepbrothers. L described his head "bumping backwards three times," even with his seatbelt on. The record contains sufficient evidence of Stone's willful conduct.

Stone has never argued that he was justified in subjecting L. to any form of physical or mental suffering. Nonetheless, he brought L. with him to confront Alison, and while L. was effectively restrained in the truck, facing forward, Stone: punched Jonson so hard that her tooth went through her lip; drove a *truck* toward *children* three times; drove the truck erratically enough for L.'s head to bump back and forth three times; hit the family dog with the truck; and aimed the truck at L.'s *mother* so that she had to jump from the street onto the grass to escape being hit or worse. L. said he had been scared, and the jury plainly believed him. Examining the whole record in the light most favorable to the judgment, we conclude it contains evidence sufficient to sustain the misdemeanor child abuse conviction, that is, a reasonable jury could find Stone guilty beyond a reasonable doubt.

D. The Trial Court Did Not Abuse Its Discretion in Denying Stone's Motion to Strike a Prior Conviction

Stone contends the trial court abused its discretion when it denied his motion to dismiss a prior strike alleged under the Three Strikes law. He argues: his strike prior (rape of his then-14-year-old daughter) occurred 25 years earlier; he served a three-year sentence; he was paroled in May 1985; his only conviction since then was a misdemeanor driving under the influence (DUI) offense 17 years ago; he registered faithfully as a sex offender; he has been a productive member of society; the current offense "stemmed from an emotional outburst under extremely extenuating circumstances"; and the court relied on factors that were unsubstantiated or contradicted by the record. The record reveals no abuse of discretion.

Pursuant to section 1385, subdivision (a), a trial court may strike or vacate an allegation or finding that a defendant was previously convicted of a serious and/or violent felony. (*People v. Williams* (1998) 17 Cal.4th 148, 158.) In *Romero, supra*, 13 Cal.4th 497, the California Supreme Court quoted from *People v. Orin* (1975) 13 Cal.3d 937, explaining that "'[t]he trial court's power to dismiss an action under section 1385, while broad, is by no means absolute. Rather, it is limited by the amorphous concept which requires that the dismissal be "in furtherance of justice.". . . [¶] From the case law, several general principles emerge. Paramount among them is the rule "that the language of [section 1385], 'in furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and the *interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]" [Citations.] At the very least, the reason for dismissal must be "that which would motivate a reasonable judge." [Citations.]'" (*Romero, supra*, 13 Cal.4th at pp. 530–531.) The trial court must take into account the defendant's background, the nature of his current offense and other individualized considerations. (*Id*. at p. 531) Striking a serious felony is an extraordinary exercise of discretion and is reserved for "extraordinary" circumstances. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 905.) The court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or

violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.) We review the ruling on a *Romero* motion for abuse of discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Here, the trial court explained its ruling on Stone's *Romero* motion after counsel argued. The court acknowledged the legal standard and stated it reviewed the applicable cases "including the cases cited by the defense." The court stated it had to "consider the nature and circumstances of both [Stone's] present felonies as well as his past felony and also the unique particulars of his background and character and prospects in making the determination whether it is outside the spirit of the Three-Strikes law." The court recognized that one of the purposes of the Three Strikes law "was to ensure longer sentences for criminal who commit at least one serious or violent felony," while at the same time affording the court discretion to strike priors in appropriate circumstances. The trial court then weighed the factors on each side.

The factors favoring Stone included the love, support, and loyalty of longstanding friends, the age of the prior, and an essentially clean record, with the exception of one DUI 18 years earlier. On the other hand, the court "look[ed] at the court file . . . [,] looked at the probation report, [and] reviewed the preliminary hearing transcript." The court observed: "We're certainly talking about a vulnerable victim, a 14-year-old biological daughter."

The trial court concluded that the conduct at issue here differed from the prior rape, but found at least one similarity between that offense and the current child endangerment conviction: the prior "ensued as a result of arguments and discord that was occurring in this marital relationship with the girl's mother when the instant offense occurred." The court noted that in the rape case, Stone had accepted an early-plea disposition and the low term of three years. The probation report and preliminary hearing transcript had reflected there were *three* separate acts of forcible rape on his daughter

"[a]nd so the court will note he actually did receive a favorable sentence." The court mentioned its concern that Stone had not revealed much accountability, blaming the rapes on his being under the influence of alcohol or drugs such that he lacked a memory of "the incident." Still, Stone did accept responsibility.

The characteristics of the current offense involved "a similar domestic situation where this type of violence resulted." A lot of minor children were involved, "particularly his own minor child . . . ." As for Stone's acceptance of responsibility, the trial court stated his "demeanor when he testified[4] basically comes that he felt it was either self-defense or accidental, which again does not take into account full accountability." Also, the current offenses concerned "an issue of violence around minor children, a similar situation where, taking into consideration that both are violent, he could and would pose a danger because this is an ongoing situation with the family law courts." Nothing indicated Stone had been under the influence or otherwise unaware of his conduct. "There was testimony of previous threats on the victim after the court order, referencing a certain level of premeditation . . . ." The court accordingly exercised its discretion "not to strike the strike."

The trial court balanced the pertinent factors according to the proper standard and exercised its discretion within the bounds of reason. We conclude there was no abuse of that discretion here.

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[4] Stone did not testify. Based on our review of the record, it appears the trial court was referring to the testimony of Deputy Sheriff Kimberly Shelton, the investigating officer in this case, who interviewed Stone on June 22, 2007, after reading him his *Miranda* rights.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P.J.

ROTHSCHILD, J.